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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958
No. 521

LANCASTER SECURITY INVESTMENT CORPORATION, a California corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING & LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST CO., *et al.,*

Appellees.

JURISDICTIONAL STATEMENT.

MORRIS LAVINE,
215 West Seventh Street,
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Appellees.

JURISDICTIONAL STATEMENT.

In accordance with paragraph 2 of Rule 13, and Rule 15 of this court, appellant herewith files his jurisdictional statement on appeal.

A.

Official Report Below.

The opinion of the District Court of Appeal is reported in 159 A. C. A. 720, and is an appendix to this jurisdictional statement.

B.

Grounds on Which Jurisdiction of This Court Is Invoked.

(i).

This is an appeal from a judgment upholding the constitutionality of Sections 2924 and 2924(b) of the Civil

Code of the State of California, and Section 692 of the Code of Civil Procedure on the ground that, inherently and as construed and applied in this case, those statutes are unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in failing to give notice to the holder of a deed of trust that his property is to be sold and forfeited. The case involves the construction and application, inherently and as construed and applied in this case, of these statutory provisions of the State of California regarding notice in a deed of trust and the provisions of the deed of trust as to whether those provisions inure to the benefit of the purchaser of the property with the obligation of the deed of trust, and whether, as construed and applied in this case, the appellant has been accorded due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Three justices of the California Supreme Court—Justices John W. Shenk, B. Rey Schauer and Jesse W. Carter, voted for a hearing of this case.

(ii).

The appeal is pursuant to Title 28, Section 1257 of the United States Code and Rules 10 and 15(e) of the Rules of the Supreme Court of the United States. The judgment below was rendered April 24, 1958, by the Second District, Division Two, of the District Court of Appeal of the State of California. A petition for hearing in the Supreme Court was duly filed and denied by

that court on September 19, 1958, Justices Shenk, Carter and Schauer being of the opinion that the petition should be granted. The hearing was denied on June 17, 1958.

Notice of appeal to this court was duly filed on September 12, 1958, pursuant to Rule 10 of the Rules of this court. Notice of appeal was filed in the District Court of Appeal of the State of California, Second Appellate District, Division Two, the highest court of the State of California which heard the cause and rendered its opinion.

The presiding justice of the District Court of Appeal, Second Appellate District, Division II, The Honorable W. Turney Fox, extended the time for docketing the record because of amplification of the record, and intervening holidays, to November 26, 1958.

(iii).

The statutory provisions believed to confer jurisdiction on this court are the Fourteenth Amendment to the Constitution of the United States in its due process clause and Title 28, Section 1257 and Sections 2101 and 2104, United States Code.

(iv).

Cases believed to sustain jurisdiction:

Stromberg v. California, 283 U. S. 359;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 313;

Grannis v. Ordean, 234 U. S. 385-394, 58 L. Ed. 1363, 1368;

Scott v. Paisley, 271 U. S. 632, 70 L. Ed. 1123;

New York v. N. Y., N. H. & H. RR. Co., 344 U. S. 293, 97 L. Ed. 333.

Statutes Involved.

Fourteenth Amendment to the Constitution of the United States:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

Civil Code, State of California:

> "§2924. Transfer as security, mortgage or pledge; power of sale, restrictions on exercise; notice of default and election to sell; waiting period; notice of sale.
>
> Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences

of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution."

Civil Code, State of California:

"§2924b. Request for copies, notices of default and of sale.

Request; recording; contents; form. Any persons desiring a copy of any notice of default and of any notice of sale under any deed of trust or mortgage with power of sale upon real property, as to which deed of trust or mortgage the power of sale cannot be exercised until such notices are given for the time and in the manner provided in Section 2924 may, at any time subsequent to the recordation or registration of such deed of trust or mortgage and prior to recordation of notice of default thereunder, cause

to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall set forth the name and address of the persons requesting copies of such notices, shall identify the deed of trust of mortgage by stating the names of the parties thereto, the date of recordation or registration thereof and the book and page where the same is recorded or the recorder's or registrar's serial number and shall be in substantially the following form:

'In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust (or mortgage) recorder ....., 19...., in Book ..... page ..... records of ..... County, (or filed for record with recorder's serial number ....., or registered under registrar's number ..... County) California, executed by ..... as trustor (or mortgagor) in which ....., is named as beneficiary (or mortgagee) and ..... as trustee be mailed to ..... at .....

Signature .....'

Recorder's duties. Immediately upon the filing for record of such request, the recorder shall enter upon the margin of the record of the deed of trust or mortgage therein referred to a reference to the place where such request is recorded, which reference shall be substantially in the following form:

'Request recorded in Book ..... page ..... of ..... for copy of notice of default and sale.'

Mailing notice. The mortgagee, trustee or other person authorized to record the notice of default, shall within 10 days following recordation of such notice of default deposit or cause to be deposited in

the United States mail an envelope, registered and with postage thereon, addressed to each person whose name and address are set forth in a duly recorded request therefor, and a reference to which request has, prior to recordation of said notice of default, been entered on the margin of the record of the deed of trust or mortgage, directed to the address designated in said request, and at least 20 days before date of sale the mortgagee, trustee or other persons authorized to make the sale shall deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor recorded, within the time herein provided, a reference to which request has been entered upon the record as above provided at the address set forth in such request.

Request in instrument; publication; service. Any deed of trust or mortgage with power of sale hereafter executed upon real property may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to any person a party thereto at the address of such person given therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as herein authorized. If, in any deed of trust or mortgage with power of sale hereafter executed, except a deed of trust or mortgage of any of the classes excepted from the provisions of Section 2924, no address of the trustor or mortgagor is therein set forth and if no request for notice by such trustor or mortgagor has been recorded as herein provided, a copy of the notice of default shall be published once a week

for at least four weeks in a newspaper of general circulation in the county in which the property is situated, such publication to commence within 10 days after the filing of the notice of default. In lieu of such publication a copy of the notice of default may be delivered personally to the trustor or mortgagor within such 10 days or at any time before publication is completed.

Recital or evidence of compliance. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or of personal delivery of the copy of the notice of default shall constitute prima facie evidence of compliance therewith and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Effect of request upon title or as notice. No request for copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest in, or lien or charge upon the property described in the deed of trust or mortgage referred to therein."

Code of Civil Procedure, State of California:

"§692. Sale on execution or under power in mortgage or deed of trust; notice

Before the sale of property on execution or under power contained in any mortgage or deed of trust, notice thereof must be given as follows:

. . .

3. Real estate. In case of real property: by posting a similar notice particularly describing the prop-

erty at least 20 days before date of sale, in one public place in the city where the property is to be sold if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation printed and published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation printed and published in the judicial district in which the property or some part thereof is situated, or, in case no newspaper of general circulation be printed and published in the city or judicial district, as the case may be, in some newspaper of general circulation printed and published in the county. Provided, that where real property is to be sold under power of sale contained in any deed of trust or under power of sale contained in a mortgage a copy of said notice shall be posted in some conspicuous place on the property to be sold, at least 20 days before date of sale.

. . ."

C.

Questions Presented by This Appeal.

This appeal presents the questions of proper notice before real estate may be sold under power of sale in a deed of trust and the validity of Sections 2924 and 2924b of the Civil Code and Section 692 of the Code of Civil Procedure of the State of California inherently and as construed and applied in this case.

Those sections provide for form and matter of notice to exercise a power of sale in a deed of trust. Section 2924b is a section passed after the depression of 1930 and

provides for notice if one files a request for the same with the county recorded of the county where the property is located, but not otherwise.

The appellant bought a valuable piece of property which the complaint alleges to be worth $60,000.00 which had a deed of trust upon it on which, at the time of sale, there was less than $3,000.00 owing. The original deed of trust made a request and contained a provision in it that the original purchaser was to receive notice of sale in the event a sale was proposed. Paragraph 7b of the deed of trust provided: "This deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns." It is conceded that the appellant did not file a request for notice himself under the provisions of Section 2924b, but his predecessor, the purchaser, did, and it is his contention that the sale of the property to him inured the benefits of that paragraph also to him, entitling him to notice of the sale. It is conceded that *no notice was given to him* before the property was sold. Furthermore, the same trustee who handled the original purchase and sale also handled the sale to the appellant and knew his name and address but did not forward or send him any notice. The questions presented in this case are then as follows:

1. Whether the appellant's valuable property, alleged in the complaint to be worth at least $60,000.00, could be taken from him and sold under a power of sale without notice to him in some form of the proposed sale; whether without such notice, he was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether, insofar as Section 2924b is construed to require only notice to the person who files a request therefor with the county clerk, that such a statute, as thus construed and applied, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether Section 2924b requiring four weeks notice by publication if appellant was not personally served, must be read into the contract of purchase and sale and the failure to so publish voids the transaction.

4. Whether a statute which provides for notice only by newspaper publication, when the person who should receive it, is known to the trustee, and his name and address are known, is valid, and is due process under the Fourteenth Amendment to the United States Constitution.

In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 313, the court said:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. . . ." The fundamental requisite of due process of law is the opportunity to be heard. "Grannis v. Ordean, 234 U. S. 385, 394, 58 L. Ed. 1363, 1368. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The court there held that the provisions of the New York statute by publication four times, once a week for four weeks, were insufficient to comply with due process. The statutory notice, the United States Supreme Court said, was inadequate because under the circumstances it is not reasonably calculated to reach those who could

easily be informed by other means at hand. *It held that the trust company could easily give postal notification to known beneficiaries.*[1] The court held that where the names of beneficiaries are in the trust company's files that they are entitled to receive notice and that the law failing to provide to give such notice depriving known persons, whose whereabouts are also known, of substantial property rights is incompatible with the requirements of the Fourteenth Amendment.

In *New York v. N. Y., N. H. & H. R.R. Co.*, 344 U. S. 293, 97 L. Ed. 333, the court said, speaking of notice:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865."

The court there held that in a bankruptcy proceeding the law requires proper persons to file a list of all known creditors, the amount and character of their claims and their last known postoffice addresses. This was not done. The court further said that non-appearing known creditors were entitled to service by mail. The court said:

> "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York has not been accorded that kind of notice."

Neither has the plaintiff in this action.

---

[1]In the case at bar the appellee, the trustee, was the same trustee in both the original transaction and the purchase by appellant, and knew his name and address. The court below held this did not require any duty on his part to notify appellant.

In *Mullane v. Central Hanover Bank & Trust Co.*, the court held that:

> "But when notice is a person's due, process which is a mere gesture, is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The procedure adopted herein then, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The procedure followed in this case was upheld by the court below. It follows, then, that Section 2924b of the Civil Code, inherently and as construed and applied in this case violates the Fourteenth Amendment to the United States Constitution. The court below has construed the statute to require *no* notice to the new purchaser of property upon a sale under a deed of trust if the new purchaser did not file any request with the county recorder.

Reasonable notice is always required to comply with the due process provisions of the Fourteenth Amendment.

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306-320.

The District Court of Appeal cited *Scott v. Paisley*, 271 U. S. 632, 70 L. Ed. 1123, which was decided June 7 1926, and prior to the passage of Section 2924b of the Civil Code of California. The cases therein cited in no wise pertain to the case here. In *Scott v. Paisley*, the Court says:

> "Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale."

The court below overlooked the fact that the deed of trust contained paragraph B7 which inured all benefits of the original purchaser to the new purchaser. Section 2924b, insofar as it requires notice by publication for at least four weeks to one who did not personally applv for a copy of a notice of default, must therefore be read into the deed of trust and here there was a non-compliance with the four weeks notice.

The *Paisley* case also did not consider the provisions contained in the instant deed of trust that the deed of trust applies and inures to the benefit of successors and assigns by contract. Then the rights of the purchaser of the property which were originally had by the original trustor passed to him. To so construe the application of the statute would be to construe it constitutionally in accordance with due process. We respectfully submit that the District Court of Appeal has not construed Section 2924b at all and that it is subsequent to the cases cited by the District Court, to wit, *Davidow v. Lachman Brothers,* 76 F. 2d 186 and 188, and *Curti v. Pacific Mtg. Guaranty Co.,* 87 F. 2d 42, 43. These cases were both prior to 1939 when Section 2924b required specific notice by publication at least four weeks before there could be any valid transfer or sale of the property and without which there was inadequate notice. Construed otherwise this section would be violative of the due process clause of the Fourteenth Amendment requiring adequate notice.

Since the issue of due notice in trust deeds and powers of sale are highly important, this is a case of plenary action which affects a large number of people. Three Justices on the Supreme Court of California, Justices Shenck, Schauer and Carter, thought that the case should

be heard by that court, and that it had plenary importance. We respectfully urge this court to review and reverse the judgment below. The questions are substantial.

Zucht v. King, 260 U. S. 174, 176, 177.

Issue of due process and the construction of these statutes inherently and as construed and applied in this case were first raised in the District Court of Appeal, Second Appellate District, State of California, and the challenge to the constitutionality was denied by that court. It was again raised in petition for hearing before the Supreme Court and was denied by that court. (See Minutes of Supreme Court.)

Notice by Advertisement Insufficient to Known Purchaser.

The notice by advertisement, when the person entitled to notice is known to the trustee, and in fact handled his purchase through the same trustee, as is foreclosing on him, is a poor substitute for actual notice in person or by mail, and is not due process guaranteed by the Fourteenth Amendment, United States Constitution.

Mullane v. Hanover Bank and Trust Co., 339 U. S. 306.

In this case the same trustee handled the original deed, and the new deed. He knew the address and whereabouts of the new purchaser. To fail to give him notice in person or by mail and then to sell his $60,000 property for $3,000 is certainly not due process guaranteed by the United States Constitution.

As thus construed and applied Sections 2924, 2924B, Civil Code of California, violate the Fourteenth Amendment, United States Constitution.

Failure of Notice by Publication for Four Weeks Void.

Section 2924B, Civil Code of California, must be deemed read into every contract. It provides that if there is service by publication, it must be at least once a week for four weeks. The trust deed notice of proposed sale alleges publication for only twenty days. Such notice, even by publication, therefore was inadequate to comply with due process guaranteed by the Fourteenth Amendment, United States Constitution.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Lancaster Security Investment Corporation, a California corporation, Plaintiff and Appellant vs. Howard M. Kessler, State Mutual Building & Loan Association, a California corporation, State Mutual Building & Loan Association, a California corporation, doing business as State Mutual Savings and Loan Association and Title Insurance and Trust Company, a corporation, Defendants.

Howard M. Kessler, State Mutual Savings & Loan Association and Title Insurance and Trust Company, Respondents. Civ. No. 22532.

Filed April 24, 1958.

Appeal from judgment and orders of the Superior Court of Los Angeles County. Arnold Praeger, Judge. Appeal from orders dismissed. Judgment affirmed.

For Appellant Lancaster Security Investment Corp.: Morris Lavine.

For Respondents Howard M. Kessler and Title Insurance and Trust Company: Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., George R. Pfeiffer.

For Respondent Howard M. Kessler: John J. Guerin.

The sole issue presented by this appeal concerns the validity of a foreclosure sale conducted by the trustee under the power of sale contained in a deed of trust. The judgment under review was rendered after a ruling which sustained defendants' objection to the introduction of any evidence. Therefore, we are called upon to decide the

Code of the State of California, and Section 692 of the Code of Civil Procedure on the ground that, inherently and as construed and applied in this case, those statutes are unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in failing to give notice to the holder of a deed of trust that his property is to be sold and forfeited. The case involves the construction and application, inherently and as construed and applied in this case, of these statutory provisions of the State of California regarding notice in a deed of trust and the provisions of the deed of trust as to whether those provisions inure to the benefit of the purchaser of the property with the obligation of the deed of trust, and whether, as construed and applied in this case, the appellant has been accorded due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Three justices of the California Supreme Court—Justices John W. Shenk, B. Rey Schauer and Jesse W. Carter, voted for a hearing of this case.

(ii).

The appeal is pursuant to Title 28, Section 1257 of the United States Code and Rules 10 and 15(e) of the Rules of the Supreme Court of the United States. The judgment below was rendered April 24, 1958, by the Second District, Division Two, of the District Court of Appeal of the State of California. A petition for hearing in the Supreme Court was duly filed and denied by

that court on September 19, 1958, Justices Shenk, Carter and Schauer being of the opinion that the petition should be granted. The hearing was denied on June 17, 1958.

Notice of appeal to this court was duly filed on September 12, 1958, pursuant to Rule 10 of the Rules of this court. Notice of appeal was filed in the District Court of Appeal of the State of California, Second Appellate District, Division Two, the highest court of the State of California which heard the cause and rendered its opinion.

The presiding justice of the District Court of Appeal, Second Appellate District, Division II, The Honorable W. Turney Fox, extended the time for docketing the record because of amplification of the record, and intervening holidays, to November 26, 1958.

(iii).

The statutory provisions believed to confer jurisdiction on this court are the Fourteenth Amendment to the Constitution of the United States in its due process clause and Title 28, Section 1257 and Sections 2101 and 2104, United States Code.

(iv).

Cases believed to sustain jurisdiction:

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> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
> . . ."

Civil Code, State of California:

> "§2924. Transfer as security, mortgage or pledge; power of sale, restrictions on exercise; notice of default and election to sell; waiting period; notice of sale.
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> Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences

of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution."

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to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall set forth the name and address of the persons requesting copies of such notices, shall identify the deed of trust of mortgage by stating the names of the parties thereto, the date of recordation or registration thereof and the book and page where the same is recorded or the recorder's or registrar's serial number and shall be in substantially the following form:

'In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust (or mortgage) recorder ....., 19...., in Book ..... page ..... records of ..... County, (or filed for record with recorder's serial number ....., or registered under registrar's number ..... County) California, executed by ..... as trustor (or mortgagor) in which ....., is named as beneficiary (or mortgagee) and ..... as trustee be mailed to ..... at .....

Signature .....'

Recorder's duties. Immediately upon the filing for record of such request, the recorder shall enter upon the margin of the record of the deed of trust or mortgage therein referred to a reference to the place where such request is recorded, which reference shall be substantially in the following form:

'Request recorded in Book ..... page ..... of ..... for copy of notice of default and sale.'

Mailing notice. The mortgagee, trustee or other person authorized to record the notice of default, shall within 10 days following recordation of such notice of default deposit or cause to be deposited in

the United States mail an envelope, registered and with postage thereon, addressed to each person whose name and address are set forth in a duly recorded request therefor, and a reference to which request has, prior to recordation of said notice of default, been entered on the margin of the record of the deed of trust or mortgage, directed to the address designated in said request, and at least 20 days before date of sale the mortgagee, trustee or other persons authorized to make the sale shall deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor recorded, within the time herein provided, a reference to which request has been entered upon the record as above provided at the address set forth in such request.

Request in instrument; publication; service. Any deed of trust or mortgage with power of sale hereafter executed upon real property may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to any person a party thereto at the address of such person given therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as herein authorized. If, in any deed of trust or mortgage with power of sale hereafter executed, except a deed of trust or mortgage of any of the classes excepted from the provisions of Section 2924, no address of the trustor or mortgagor is therein set forth and if no request for notice by such trustor or mortgagor has been recorded as herein provided, a copy of the notice of default shall be published once a week

for at least four weeks in a newspaper of general circulation in the county in which the property is situated, such publication to commence within 10 days after the filing of the notice of default. In lieu of such publication a copy of the notice of default may be delivered personally to the trustor or mortgagor within such 10 days or at any time before publication is completed.

Recital or evidence of compliance. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or of personal delivery of the copy of the notice of default shall constitute prima facie evidence of compliance therewith and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Effect of request upon title or as notice. No request for copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest in, or lien or charge upon the property described in the deed of trust or mortgage referred to therein."

Code of Civil Procedure, State of California:

"§692. Sale on execution or under power in mortgage or deed of trust; notice

Before the sale of property on execution or under power contained in any mortgage or deed of trust, notice thereof must be given as follows:

. . .

3. Real estate. In case of real property: by posting a similar notice particularly describing the prop-

erty at least 20 days before date of sale, in one public place in the city where the property is to be sold if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation printed and published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation printed and published in the judicial district in which the property or some part thereof is situated, or, in case no newspaper of general circulation be printed and published in the city or judicial district, as the case may be, in some newspaper of general circulation printed and published in the county. Provided, that where real property is to be sold under power of sale contained in any deed of trust or under power of sale contained in a mortgage a copy of said notice shall be posted in some conspicuous place on the property to be sold, at least 20 days before date of sale.

. . ."

C.

Questions Presented by This Appeal.

This appeal presents the questions of proper notice before real estate may be sold under power of sale in a deed of trust and the validity of Sections 2924 and 2924b of the Civil Code and Section 692 of the Code of Civil Procedure of the State of California inherently and as construed and applied in this case.

Those sections provide for form and matter of notice to exercise a power of sale in a deed of trust. Section 2924b is a section passed after the depression of 1930 and

provides for notice if one files a request for the same with the county recorded of the county where the property is located, but not otherwise.

The appellant bought a valuable piece of property which the complaint alleges to be worth $60,000.00 which had a deed of trust upon it on which, at the time of sale, there was less than $3,000.00 owing. The original deed of trust made a request and contained a provision in it that the original purchaser was to receive notice of sale in the event a sale was proposed. Paragraph 7b of the deed of trust provided: "This deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns." It is conceded that the appellant did not file a request for notice himself under the provisions of Section 2924b, but his predecessor, the purchaser, did, and it is his contention that the sale of the property to him inured the benefits of that paragraph also to him, entitling him to notice of the sale. It is conceded that *no notice was given to him* before the property was sold. Furthermore, the same trustee who handled the original purchase and sale also handled the sale to the appellant and knew his name and address but did not forward or send him any notice. The questions presented in this case are then as follows:

1. Whether the appellant's valuable property, alleged in the complaint to be worth at least $60,000.00, could be taken from him and sold under a power of sale without notice to him in some form of the proposed sale; whether without such notice, he was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether, insofar as Section 2924b is construed to require only notice to the person who files a request therefor with the county clerk, that such a statute, as thus construed and applied, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether Section 2924b requiring four weeks notice by publication if appellant was not personally served, must be read into the contract of purchase and sale and the failure to so publish voids the transaction.

4. Whether a statute which provides for notice only by newspaper publication, when the person who should receive it, is known to the trustee, and his name and address are known, is valid, and is due process under the Fourteenth Amendment to the United States Constitution.

In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 313, the court said:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. . . ." The fundamental requisite of due process of law is the opportunity to be heard. "Grannis v. Ordean, 234 U. S. 385, 394, 58 L. Ed. 1363, 1368. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The court there held that the provisions of the New York statute by publication four times, once a week for four weeks, were insufficient to comply with due process. The statutory notice, the United States Supreme Court said, was inadequate because under the circumstances it is not reasonably calculated to reach those who could

easily be informed by other means at hand. *It held that the trust company could easily give postal notification to known beneficiaries.*[1] The court held that where the names of beneficiaries are in the trust company's files that they are entitled to receive notice and that the law failing to provide to give such notice depriving known persons, whose whereabouts are also known, of substantial property rights is incompatible with the requirements of the Fourteenth Amendment.

In *New York v. N. Y., N. H. & H. R.R. Co.*, 344 U. S. 293, 97 L. Ed. 333, the court said, speaking of notice:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865."

The court there held that in a bankruptcy proceeding the law requires proper persons to file a list of all known creditors, the amount and character of their claims and their last known postoffice addresses. This was not done. The court further said that non-appearing known creditors were entitled to service by mail. The court said:

> "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York has not been accorded that kind of notice."

Neither has the plaintiff in this action.

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[1]In the case at bar the appellee, the trustee, was the same trustee in both the original transaction and the purchase by appellant, and knew his name and address. The court below held this did not require any duty on his part to notify appellant.

In *Mullane v. Central Hanover Bank & Trust Co.*, the court held that:

> "But when notice is a person's due, process which is a mere gesture, is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The procedure adopted herein then, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The procedure followed in this case was upheld by the court below. It follows, then, that Section 2924b of the Civil Code, inherently and as construed and applied in this case violates the Fourteenth Amendment to the United States Constitution. The court below has construed the statute to require *no* notice to the new purchaser of property upon a sale under a deed of trust if the new purchaser did not file any request with the county recorder.

Reasonable notice is always required to comply with the due process provisions of the Fourteenth Amendment.

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306-320.

The District Court of Appeal cited *Scott v. Paisley*, 271 U. S. 632, 70 L. Ed. 1123, which was decided June 7, 1926, and prior to the passage of Section 2924b of the Civil Code of California. The cases therein cited in no wise pertain to the case here. In *Scott v. Paisley*, the Court says:

> "Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale."

The court below overlooked the fact that the deed of trust contained paragraph B7 which inured all benefits of the original purchaser to the new purchaser. Section 2924b, insofar as it requires notice by publication for at least four weeks to one who did not personally apply for a copy of a notice of default, must therefore be read into the deed of trust and here there was a non-compliance with the four weeks notice.

The *Paisley* case also did not consider the provisions contained in the instant deed of trust that the deed of trust applies and inures to the benefit of successors and assigns by contract. Then the rights of the purchaser of the property which were originally had by the original trustor passed to him. To so construe the application of the statute would be to construe it constitutionally in accordance with due process. We respectfully submit that the District Court of Appeal has not construed Section 2924b at all and that it is subsequent to the cases cited by the District Court, to wit, *Davidow v. Lachman Brothers,* 76 F. 2d 186 and 188, and *Curti v. Pacific Mtg. Guaranty Co.,* 87 F. 2d 42, 43. These cases were both prior to 1939 when Section 2924b required specific notice by publication at least four weeks before there could be any valid transfer or sale of the property and without which there was inadequate notice. Construed otherwise this section would be violative of the due process clause of the Fourteenth Amendment requiring adequate notice.

Since the issue of due notice in trust deeds and powers of sale are highly important, this is a case of plenary action which affects a large number of people. Three Justices on the Supreme Court of California, Justices Shenck, Schauer and Carter, thought that the case should

be heard by that court, and that it had plenary importance. We respectfully urge this court to review and reverse the judgment below. The questions are substantial.

Zucht v. King, 260 U. S. 174, 176, 177.

Issue of due process and the construction of these statutes inherently and as construed and applied in this case were first raised in the District Court of Appeal, Second Appellate District, State of California, and the challenge to the constitutionality was denied by that court. It was again raised in petition for hearing before the Supreme Court and was denied by that court. (See Minutes of Supreme Court.)

Notice by Advertisement Insufficient to Known Purchaser.

The notice by advertisement, when the person entitled to notice is known to the trustee, and in fact handled his purchase through the same trustee, as is foreclosing on him, is a poor substitute for actual notice in person or by mail, and is not due process guaranteed by the Fourteenth Amendment, United States Constitution.

Mullane v. Hanover Bank and Trust Co., 339 U. S. 306.

In this case the same trustee handled the original deed, and the new deed. He knew the address and whereabouts of the new purchaser. To fail to give him notice in person or by mail and then to sell his $60,000 property for $3,000 is certainly not due process guaranteed by the United States Constitution.

As thus construed and applied Sections 2924, 2924B, Civil Code of California, violate the Fourteenth Amendment, United States Constitution.

Failure of Notice by Publication for Four Weeks Void.

Section 2924B, Civil Code of California, must be deemed read into every contract. It provides that if there is service by publication, it must be at least once a week for four weeks. The trust deed notice of proposed sale alleges publication for only twenty days. Such notice, even by publication, therefore was inadequate to comply with due process guaranteed by the Fourteenth Amendment, United States Constitution.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Lancaster Security Investment Corporation, a California corporation, Plaintiff and Appellant vs. Howard M. Kessler, State Mutual Building & Loan Association, a California corporation, State Mutual Building & Loan Association, a California corporation, doing business as State Mutual Savings and Loan Association and Title Insurance and Trust Company, a corporation, Defendants.

Howard M. Kessler, State Mutual Savings & Loan Association and Title Insurance and Trust Company, Respondents. Civ. No. 22532.

Filed April 24, 1958.

Appeal from judgment and orders of the Superior Court of Los Angeles County. Arnold Praeger, Judge. Appeal from orders dismissed. Judgment affirmed.

For Appellant Lancaster Security Investment Corp.: Morris Lavine.

For Respondents Howard M. Kessler and Title Insurance and Trust Company: Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., George R. Pfeiffer.

For Respondent Howard M. Kessler: John J. Guerin.

The sole issue presented by this appeal concerns the validity of a foreclosure sale conducted by the trustee under the power of sale contained in a deed of trust. The judgment under review was rendered after a ruling which sustained defendants' objection to the introduction of any evidence. Therefore, we are called upon to decide the

purely legal question whether the complaint stated a cause of action, that is to say, whether the facts alleged afforded any legal ground upon which to hold the trustee's sale invalid. Accordingly, the facts will be stated largely in the language of the complaint.

The deed of trust in question, which is conventional in form, was executed on January 19, 1950, by Mr. and Mrs. Eilers, plaintiff's predecessors in interest, to secure their obligation to repay a loan made by defendant State Mutual Building and Loan Association. The parties to the instrument were: (1) the Eilers as borrowers and "trustors", (2) defendant State Mutual as lender and "beneficiary", and (3) defendant Title Insurance and Trust Company as "trustee."

On April 27, 1953, appellant (plaintiff below) purchased the encumbered real property from the trustors and assumed the obligation secured by the trust deed. According to the complaint, State Mutual "was notified that said property was transferred to plaintiff and that plaintiff assumed the payment of the obligation under said deed of trust, and was further notified that plaintiff's address was Box 987, Lancaster, California."

Thereafter, a default occurred whereupon State Mutual executed a declaration of default and election to sell. Pursuant thereto the trustee proceeded to exercise the power of sale. At the trustee's sale held on April 18, 1956, defendant Kessler purchased the property for $3000. It is alleged that on the date of sale "there was due and unpaid under said deed of trust . . . a sum less than $2000" and that "the reasonable value of said . . . property is between $50,000 and $60,000." Apart from allegations concerning plaintiff's offers fully to reimburse the purchaser and to pay any and all additional sums that

might be deemed equitable, the following is the only other consequential allegation of fact to be found in the complaint: "That neither the plaintiff, nor any of its officers, received notice of the trustee's sale." The prayer of the complaint sought a judgment declaring the trustee's sale to be null and void and quieting appellant's title.

It is recited in the judgment that "counsel for plaintiff having stated no additional facts could be alleged in an amended pleading" defendants' objection to the introduction of any evidence was sustained.

Appellant's major contention appears to be that since the original trustors were entitled to have notice of sale mailed to them at their address as given in the trust deed, and since the beneficiary had been notified of appellant's acquisition of the property, and of appellant's address, appellant, as successor in interest to the original trustors, was entitled "to specific notice under section 2924b of the Civil Code."

This contention is untenable. The only requirements of notice of sale essential to the validity of a sale under a power contained in a deed of trust are those expressly and specifically prescribed by the terms of the instrument and by the provisions of the applicable statutes. (Ley v. Babcock, 118 Cal. App. 525, 528-529; Billings v. Farm Development Company, 74 Cal. App. 254, 264; Meyer v. Zuber, 92 Cal. App. 767, 772-773; Sargent v. Shumaker, 193 Cal. 122-130.)

As stated in 34 Cal. Jur. 2d, §454, p. 128: "Not less than 3 months after notice of default is given, the trustee, mortgagee, or beneficiary must give notice of sale, stating the time and place thereof in the manner required for sales of real property on execution. A notice that does not meet the statutory requirements is invalid. *But*

no additional notice need be given. Except where he formally requests notice, the fact that the debtor is not personally notified is immaterial, so long as there is compliance with the conditions prescribed in the statute." (Emphasis added.)

The same contention as that made by appellant here was rejected in Ley v. Babcock, *supra*, 118 Cal. App. 525, 528, in the following language: "The trial court found that notice was given in full compliance with the terms of the deed of trust and with the provisions of Section 692 of the Code of Civil Procedure. It was *not at any time necessary that personal notice be served upon the appellants;* it is sufficient if the statute and the terms of the trust deed are followed. (Witter v. Bank of Milpitas, 204 Cal. 570, 573, and cases cited.)" (Emphasis added.)

Section 2924 of the Civil Code provides that after other specified procedural steps have been taken in the exercise of a power of sale, the trustee "shall give notice of sale stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution." Section 692 of the Code of Civil Procedure specifically prescribes the notice which must be given before the sale of property under execution or under a power contained in a deed of trust. The deed of trust involved in the present case contains the request of the trustors that a copy of any notice of default and a copy of any notice of sale be mailed to them at their given address as provided for in Civil Code section 2924b. The latter section contains provisions whereby any person desiring a copy of any notice of default and of any notice of sale under a trust deed may file with the County Recorder a request therefor containing certain data as prescribed by the statute.

Appellant expressly concedes that it filed no request for notice under the provisions of section 2924b. The instrument here involved contains no other provisions for notice which would add to the requirements of the statutes. Appellant did not allege, nor does appellant assert on this appeal that it could allege, that there was any failure to give any notice required by the applicable statutes.

Appellant's opening brief betrays a gross misunderstanding of the procedural provisions for the foreclosure of trust deeds by exercise of the power of sale. After calling attention to the fact that the trustee's deed (attached as an exhibit to the complaint) recited publication of the *notice of sale* once a week during a period of *twenty days*, appellant quotes a portion of section 2924b requiring (under conditions not present here) publication of the *notice of default* once a week for at least *four weeks*. Appellant thereupon draws the obviously false conclusion that the publication of the notice of sale once a week during a period of twenty days was inadequate. The plain language of section 692 of the Code of Civil Procedure is a clear refutation. Furthermore, there was no occasion for any publication of the notice of default in this case because the address of the trustors was set forth in the deed of trust and their request for a copy of the notice was contained therein.

Equally unsound is the contention that the "due process" clauses of the State and Federal Constitutions entitled appellant to special or personal notice of the trustee's sale. In Scott v. Paisley, 271 U. S. 632, 70 L. Ed. 1123, the appealing plaintiff challenged the validity of a Georgia statute providing for summary enforcement of an instrument in the nature of a trust deed, but known in

Georgia as a "security deed." Plaintiff in that case, like the appellant here, was successor in interest to the grantor under the security deed. The United States Supreme Court rejected plaintiff's contention that the statute providing for a foreclosure of the plaintiff's interest in the land through a proceeding to which she was not a party, and without notice, was in conflict with the due process and equal protection clauses of the Fourteenth Amendment. The following excerpts from the opinion appear to be particularly pertinent (271 U. S. at pages 635 and 636):

"In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. . . . So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And §6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws."

The United States Court of Appeals for the Ninth Circuit has specifically held that the provisions of section 2924 of our Civil Code are not in conflict with the due process clause of the Federal Constitution. (Davidow v. Lachman Bros. Inv. Co., 76 Fed. 2d 186, 188; Curti v. Pacific Mortgage Guaranty Co., 87 Fed. 2d 42, 43.) Appellant has cited no decision, state or federal, which tends to support its position in this regard.

Appellant further contends that under the facts here alleged, it would be violative of the due process clause of the Fourteenth Amendment to apply the rule that all facts recited in the trustee's deed affecting the regularity of the sale are conclusively presumed to be true. This rule has been applied in a legion of California cases. It is sufficient to cite Central Nat. Bank v. Bell, 5 Cal. 2d 324, 326; Cobb v. California Bank, 6 Cal. 2d 389, 390; Karrell v. First Thrift of Los Angeles, 104 Cal. App. 2d 536, 539; Abrahamer v. Parks, 141 Cal. App. 2d 82, 84.

However, the short answer to this contention is that it is not necessary to invoke any conclusive presumption in order to sustain the present judgment. Appellant has not alleged the existence of any fact which indicates the slightest irregularity in the sale at which defendant Kessler was the purchaser. There is no allegation that Kessler had any relationship to the transaction other than that of being a purchaser. There is no allegation of any fact which would place Kessler in any position other than that of a bona fide purchaser for value without notice. (Karrell v. First Thrift of Los Angeles, *supra*, 104 Cal. App. 2d 536, 539.)

Appellant's allegations to the effect that there was great disparity between the value of the property and the amount for which it was sold are unavailing. It has been held repeatedly that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a sale legally made. (Sargent v. Shumaker, *supra*, 193 Cal. 122, 129; Bank of America etc. v. Century, etc., Co., 19 Cal. App. 2d 194, 196; Crofoot v. Tarman, 147 Cal. App. 2d 443, 446, 447.) It can be stated positively that in this case, as in the case last cited, "there is nothing in the record to the effect that anything done or left un-

done by the trustee prevented the public from attending at the sale or in anywise discouraged bidding."

Finally, appellant contends that the defendant Title Insurance and Trust Company, trustee under the trust deed, had notice of appellant's interest in the property securing the debt. Appellant argues that the trustee was under a duty to give notice of the sale to the appellant on the basis of the trustee's relationship with appellant's predecessors in interest under general principles of trust law. The argument misconceives the legal incidents of a trust deed. An ordinary trust deed is little more than a mortgage with power to convey. (Bank of Italy etc. Assn. v. Bentley, 217 Cal. 644, 654.) "A trustee under a deed of trust does not assume the important obligations which in some instances are cast upon a trustee by operation of law." (Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510, and cases cited.) The trustee of a trust deed is not a trustee in the strict sense of the word. The role of such a trustee is more nearly that of a common agent of the parties to the instrument. (Pacific S. & L. Co. v. N. American etc. Co., 37 Cal. App. 307, 310.) Merely by virtue of its position as trustee, defendant was under no duty to give appellant special notice of the sale.

Appellant's notice of appeal indicates that the appeal is taken from the judgment and "from the orders after judgment." The quoted portion of the notice of appeal is wholly ineffective for at least two reasons: (1) It does not identify any "specified" order as required by Rule 1a of the Rules on Appeal. (Colden v. Broadway State Bank, 11 Cal. App. 2d 428.) (2) The only order after judgment contained in the record on appeal is a minute order dated March 1, 1957, which recites that plaintiff's motion for a new trial was abandoned and which denies

a motion to set aside the judgment. The motion to set aside the judgment recites that it was made "on the ground that the Court in its judgment made a mistake of fact in stating that there were no additional facts that could be alleged in an amended pleading, and upon the further ground that the court erred in holding that the complaint failed to state a cause of action and in sustaining an objection to the introduction of any evidence." Said motion further recites that it would be based upon the records and files and upon the affidavit of one of plaintiff's attorneys. The record before us does not contain either the affidavit or any other evidentiary matter offered in support of this motion, which, apparently, amounted to nothing more than a request that the trial court reconsider its original action. The order denying it therefore is non-appealable. (McKenna v. Elliott & Horne Co., 118 Cal. App. 2d 551.)

The judgment is affirmed and the purported appeal from the "orders after judgment" is dismissed.

HERNDON, *J.*

I concur:

Fox, *P. J.*

ASHBURN, *J.*, being disqualified, did not participate therein.